CASE NO. 92-568

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

v.

DAVID WYANT,

Respondent.

STATE OF OHIO,

Petitioner,

v.

JAMES MAY, JR., et. al.,

Respondent.

STATE OF OHIO,

Petitioner,

v.

CLANCY VAN GUNDY, et. al.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT
NOS. 91-199, 91-1519, 91-1211/1589**

**REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

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QUESTION PRESENTED

WHETHER OHIO REVISED CODE SECTION 2927.12, WHICH PROVIDES FOR A PENALTY ENHANCEMENT IF CERTAIN CRIMINAL CONDUCT IS COMMITTED "BY REASON OF THE RACE, COLOR, RELIGION OR NATIONAL ORIGIN OF ANOTHER PERSON OR GROUP OF PERSONS", VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

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REPLY ARGUMENT

I. INDEPENDENT STATE GROUNDS

The briefs in opposition of both Blazer and Wyant[1] contend the petition for writ of certiorari is barred by "independent state grounds". There is a marked difference in tenor between Blazer's brief, page 15, wherein, "respondent does not strenuously argue that the decision of the Ohio Supreme Court rests on independent state grounds, . . .", and Wyant's brief, which devotes nearly one-half of its text to the issue. Accordingly, this portion of the reply is directed to Wyant's brief.

In an attempt to avoid review on the merits, Wyant has mischaracterized the standard for "independent state grounds," Ohio law, and the decision of the Court below.

Most revealing is Wyant's admission (brief, page 3, footnote 2) that the "Ohio Supreme Court has not been reluctant to hold provisions of the Ohio Constitution to be coextensive with analogous provisions of the federal constitution." Wyant argues, by negative inference, that since the Ohio Supreme Court did not specifically state Article I, 11 of the Ohio Constitution is coextensive with the First Amendment, the lower court did not intend such a result. However, this argument turns this Court's rule on independent state grounds on its head. In *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), this Court established a presumption in favor of review if a lower court did not affirmatively state that its decision was based on independent state grounds. Wyant argues that this Court should presume "independence" from the failure to affirmatively state coextensiveness.

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[1] Two separate briefs in opposition to the petition for writ of certiorari have been filed: one on behalf of respondent Blazer and one filed jointly on behalf of respondents Wyant, Staton, Plessinger, Clancy Van Gundy, Krebs, and Culp (hereinafter Wyant brief). The other respondents either waived or failed to file briefs in opposition.

Wyant had to admit that the Ohio Supreme Court has frequently treated federal and state constitutional provisions the same; there are literally hundreds of cases in which the Ohio Supreme Court has referred to federal and state constitutional provisions in the same breath. To the contrary, Wyant does not identify one case in which the Ohio Supreme Court has ever treated Article I, 11 of the Ohio Constitution as anything but coextensive with the First Amendment. The general rule in Ohio is:

> We look to federal case law to delineate the right of relators under both the state and federal provision. The Ohio Constitution's guarantees in these matters are substantially equivalent to the United States constitution's guarantees.

State, ex rel. Heller v. Miller (1980) 61 Ohio St. 2d 6, 399 N.E. 2d 66 (dealing with equal protection, due process clauses).

Wyant attempts to diminish *State, ex rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992) 63 Ohio St.3d 354, 588 N.E. 2d 116, cited by petitioner as a case in which the Ohio Supreme Court equated Article I, 11 of the Ohio Constitution and the First Amendment. In that case, the Ohio Supreme Court was specifically asked to adopt a broader reading of the Ohio Constitution, since this Court had already rendered a First Amendment opinion relating to similar facts. Wyant correctly states that the Ohio Supreme Court adopted the decision of an intermediate appellate court and did not write its own opinion. However, Wyant ignores that the Ohio Supreme Court "affirmed on the *authority* of the court of appeals' decision below". *Rear Door Bookstore*, 63 Ohio St.3d at 355. (Emphasis added). Wyant's argument that *Rear Door Bookstore* is not precedent since there is no syllabus is mistaken. The unanimous adoption of a lower court opinion is analogous to a *per curiam* opinion, which is one "concurred in by all the judges concurring in the judgment." *State, ex rel. Keller v. Forney* (1923) 108 Ohio St. 463, 468, 141 N.E. 16. Such an opinion is precedent under Ohio law. *State ex rel. Canada v. Phillips* (1958) 168 Ohio

St. 191, 151 N.E.2d 722 (paragraph 6 of the syllabus). ("[A]n opinion *per curiam* or by the court represents a pronouncement of law by this court.") *See* Rule 1(C) of the Ohio Supreme Court Rules for the Reporting of Opinions (1983).

This Court in *Michigan v. Long*, *supra*, recognized the need to insure uniformity of decision making with respect to federal constitutional claims. If all that was necessary to preclude review was reference to a coextensive state constitutional ground, then this Court would not be able to review a federal constitutional claim no matter how erroneous the decision, and no matter that the state constitutional ground was dictated thereby. *See* Lewin, *Avoiding the Supreme Court*, New York Times, October 17, 1976 (magazine). While a state court is certainly free to act independently on matters of state constitutional law, this Court did not ask too much of such courts in requiring a statement free from doubt that independence of result was intended.

Admittedly, the decision of the court below states that both Article I, 11 of the Ohio Constitution and the First Amendment to the federal constitution are violated by Ohio's penalty enhancement law. However, the lower court in *Michigan v. Long* had also made a dual constitutional reference. *See People v. Long*, 413 Mich. 461, 472; 320 N.W. 2d 866, 870 (1982). Like in *Michigan v. Long*, reference to the opinion of the lower court herein shows that independence of result was not stated or intended.[2]

There are 9 references in the opinion to the Ohio Constitution. In each instance, the Court links the Ohio Constitution and the federal constitution. Furthermore, the Court's constitutional analysis is intertwined as all pertinent citations to case law are to the First Amendment decisions

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[2] In *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1985), this Court faced the same situation. The Ohio Supreme Court's syllabus referred to both the state and federal constitutions. The opinion of the lower court showed that the state constitutional decision was predicated on interpretation of federal constitutional law.

of this Court. Moreover, the Court also independently analyzed the First Amendment without any reference to the Ohio Constitution. Petition, appendix, A-13; *State v. Wyant* (1992) 64 Ohio St.3d 566, 574-5, 597 N.E. 2d 450.

Wyant selectively quotes from *California v. Freeman*, 488 U.S. 1311, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989) to support the independent state ground argument. That case provides a perfect example where this Court found that a state court's discussion of its penal code expressed the dispositive holding of the case and was not interwoven with its discussion of federal law: "Discussion of federal law - specifically the First Amendment - is strictly confined to the second subsection and constitutes an independent alternative holding." This is precisely *not* the situation in the instant case where the Court's discussion of the Ohio Constitutional provision is closely intertwined with its discussion of the First Amendment and this Court's pronouncements regarding the same.

Wyant cites only to one quote in *Wyant:*

> The freedoms of speech, press, religion, and assembly are guaranteed together in the First Amendment because they share a core value; the freedom of an individual to frame his thoughts and beliefs. The constitution of Ohio is even more specific; it guarantees to every citizen freedom to 'speak, write, and publish his sentiments on all subjects' ".

Petition, appendix, A-16; *Wyant*, 64 Ohio St.3d at 577. The Ohio Supreme Court's opinion does not state that the protections of the Ohio Constitution are broader than the federal constitution. Rather, the Ohio Constitution is more specific in enunciating the same core values it shares with the First Amendment. Rather than showing independence, the quote confirms coextensiveness.

II. *R.A.V.*

Both briefs in opposition assert that the issue presented is controlled by this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. ___ , 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992). Even were that accurate, it is not necessarily a ground for denying certiorari. In either event, this case presents a vehicle for elaboration of *R.A.V.* . The cavalier assertion that *R.A.V.* is this Court's last word, however, is belied by the care which the Court took to indicate the narrowness of the question being decided. This case involves a far different statute than the one examined in *R.A.V.* and presents a very open question indeed.[3]

Respondents' mistaken reliance on *R.A.V.* is illustrated by Wyant's statement (brief, page 7) that "fighting words" are "the category ostensibly at issue in the present case". "Fighting words" is a concept justifying the direct regulation of speech. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). This case does not involve "fighting words" since the Ohio statute is aimed at conduct, not speech.[4]

As this Court stated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed. 2d 672, (1968):

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[3] Respondents do not dispute that there is a conflict of state court decisions as contended in the petition. Indeed, the Oregon Supreme Court's opinion upholding their penalty enhancement law was rendered one day after the decision of the court below. *State v. Plowman*, 314 Ore. 157, ___ P.2d ___ , 1992 Ore. LEXIS 158 (1992) *See also Dobbins v. Florida*, 1992 Fla. App. LEXIS 10062, 17 Fla. L. Weekly D2222 (September 24, 1992). The issue involved in this case is now before the Florida and Vermont Supreme Courts and petitioner is aware of lower court cases in California, Idaho, Michigan, and Pennsylvania. The issue both deserves and demands an answer.

[4] The underlying predicate offenses of R.C. 2927. 12 include both acts of physical conduct, such as criminal mischief, and acts of verbal conduct, such as telephone harassment. Analysis of the constitutional issues does not, in petitioner's view, depend on the type of conduct involved.

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.

391 U.S. at 376. This Court recently reiterated this basic principle in *R.A.V.*:

> Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

505 U.S. at ___ , 112 S. Ct. at 2546-7, 120 L.Ed. 2d at 321-22.

Extending the erroneous premise that the Ohio statute is aimed at speech, not conduct, Wyant argues that the "additional harm consists entirely of the offensiveness of the communication to others of the offender's bigoted viewpoint". Wyant brief, page 8. The amici briefs filed in support of the petition by numerous states and diverse organizations vividly counter that contention by referring to actual examples of the crimes the Ohio statute is designed to redress. Increased punishment is justified not by the offensiveness of the message, but by the real harm caused to people who are threatened, harassed and assaulted simply because of who they are. Congress itself has recognized the special harm caused by "hate" crimes. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275. Extensive scholarly literature notes increased victim impact, and the potential for societal disruption in retaliatory acts. Respondents falsely construe Ohio's statute as intending to punish offensive speech. A real harm exists which Ohio and the legislatures of most other states have sought to address.

Respondents go on to argue that Ohio may punish "harm" through content neutral statutes. Wyant even suggests two examples: "with specific intent to create terror in a definable community" and "with specific intent to issue a threat of further crime". Aside from the fact that respondents would

assuredly claim such statutes are vague, the argued need for such statutes confuses "content based" with "conduct based". A content neutral statute is not required when a statute is directed at conduct rather than speech and does not target that conduct on the basis of expressive content even if the conduct expresses a discriminatory idea or philosophy. *R.A.V.*, 505 U.S. at ___ , 112 S.Ct. at 2546-7, 120 L.Ed.2d at 321-22. The Ohio law is precisely that kind of statute.

Respondents also minimize the threat to other discrimination statutes posed by the reasoning of the court below. Respondents argue that such statutes are not before the Court, and in any event, discrimination statutes are directed against the act of discrimination, not discriminatory thought. However, the threat to other civil rights laws and the superficial nature of the distinction between those laws and "hate crime" legislation have been the subject of extensive commentary to the contrary. One example:

> . . . if the First Amendment or any other provision of the Bill of Rights were to require governmental indifference to the racial or otherwise bigoted motive underlying a hurtful act, it would follow that an enormous body of anti-discrimination law, both state and federal, would be unconstitutional.
>
> * * *
>
> For the distinction is one that will, in the end, crumble under analysis . . . .

Testimony of Laurence Tribe, Tyler Professor of Constitutional Law, Harvard Law School, before the Subcommittee on Crime and Criminal Justice of the U.S. House of Representatives regarding H.R. 4797, Hate Crimes Sentencing Enhancement Act of 1992, July 29, 1992, at page 5. The Court should accept certiorari precisely to examine the purported distinction.

Finally, respondents offer an interpretation of *Dawson v.*

Delaware, 503 U.S. ___ , 112 S. Ct. 1093, 117 L.Ed. 2d 309 (1992) which is more an admission in petitioner's favor, than a distinction against granting certiorari. Wyant's brief, page 12, states, "Racist sentiment, although protected by the First Amendment, may, like anything else, be used as evidence of content-neutral sentencing factors." Wyant agrees that racial animus is relevant during the sentencing phase of a trial when assessing the harm to the victim. Yet, Wyant makes an unfounded leap of logic that a legislature may not make the same assessment without turning "racist sentiment" itself into a sentencing factor. Ohio's statute does not make racist sentiment a sentencing factor. The legislature has determined, like the sentencer in *Dawson*, that discriminatory selection of a victim is evidence of increased harm. When the state proves beyond a reasonable doubt that the offender committed the underlying predicate offense "by reason of race" etc., it is proof that the content-neutral factor of "increased harm" should be imposed. Respondents' attempt to distinguish *Dawson* is without substance and this Court should accept certiorari to so hold.

For the above reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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